

BEFORE THE

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Federal Communications Commission APR 29 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-54
GAF BROADCASTING COMPANY, INC.)	File No. BRH-910201WL
For Renewal of the License)	
of FM Broadcasting Station WNCN)	
New York, New York)	
CLASS ENTERTAINMENT)	File No. BPH-910430ME
AND COMMUNICATIONS, L.P.)	
THE FIDELIO GROUP, INC.)	File No. BPH-910502MQ
For a Construction Permit)	
for a New FM Station on)	
104.3 MHz at New York, New York)	

To: The Commission

**OPPOSITION TO
PETITION FOR RECONSIDERATION**

GAF Broadcasting Company, Inc. ("GAF"), by its attorneys and pursuant to Section 1.106(g) of the FCC Rules, hereby respectfully opposes the April 14, 1993 petition ("Petition") filed by Listener's Guild, Inc. (the "Guild") seeking reconsideration of the Hearing Designation Order ("HDO") in this proceeding.¹ In opposition, the following is shown.

The Guild seeks reconsideration insofar as the HDO adversely affected its ability to participate in the comparative hearing. As set out below, however, the fact that EEO Branch review of

¹DA 93-226, Chief, Audio Services Division, released March 15, 1993.

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GAF's EEO record remains pending has in no way prejudiced the Guild or resolution of its one remaining allegation. The HDO properly refused to designate other issues sought by the Guild, and thus correctly declined to name the Guild a party.

**SEPARATION OF EQUAL EMPLOYMENT OPPORTUNITY
PROCESSING WAS NOT ARBITRARY OR PREJUDICIAL TO THE GUILD**

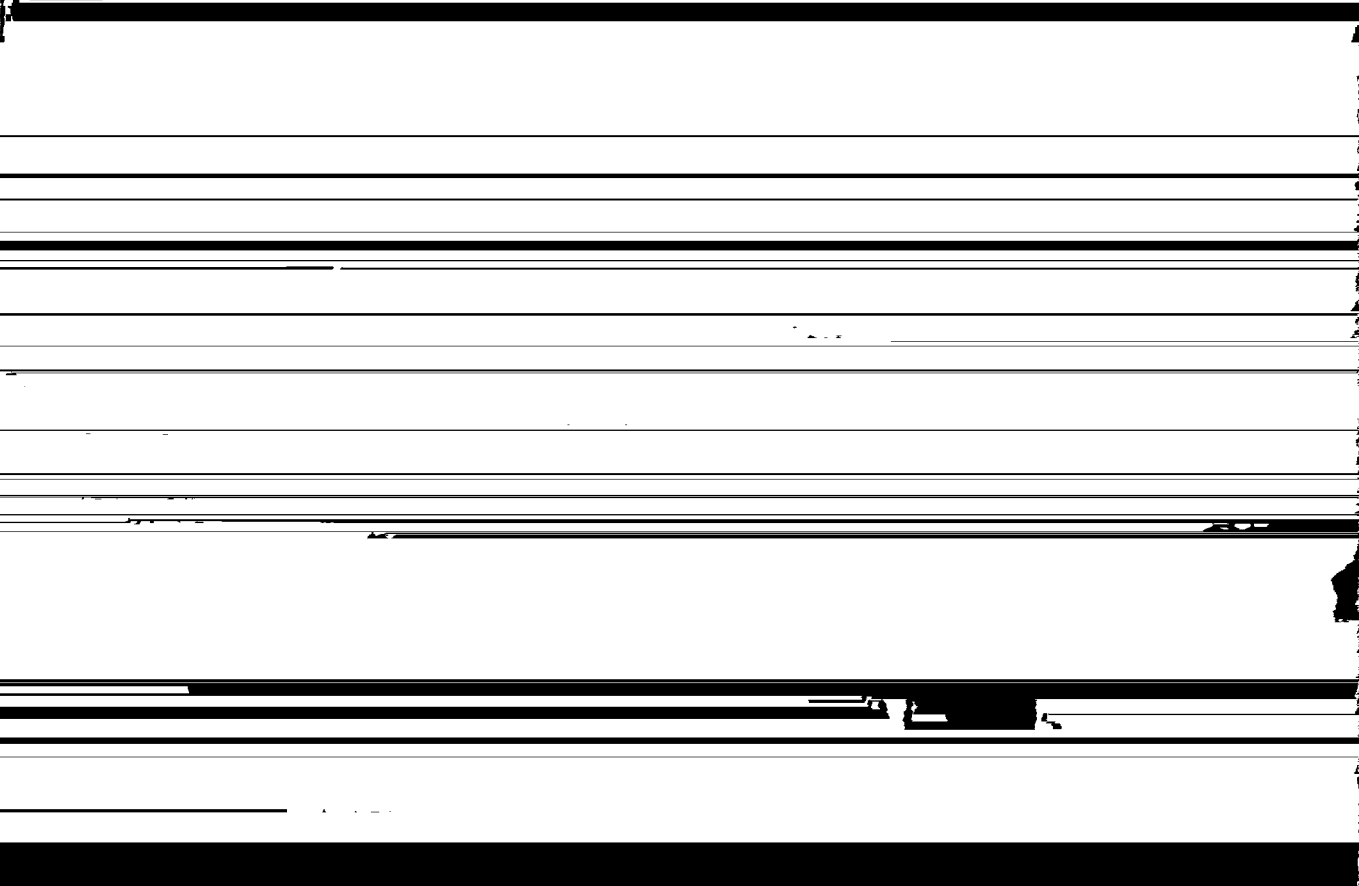
Although the HDO in this proceeding denied numerous issues sought by the Guild, it did not resolve the allegations made concerning WNCN's EEO record. The HDO expressly stated that such allegations had been referred to the Mass Media Bureau's EEO Branch, and that any grant of GAF's renewal application will be conditioned on their resolution. DA 93-226 at n.1 (Note). The Guild now claims that the "bifurcation" in processing GAF's renewal application is "highly prejudicial," by excluding the Guild from the comparative proceeding and supposedly denying it the "statutory right" to a "hearing on its EEO allegations." Petition at 3. The Guild's arguments grossly distort the simple procedure followed here, which in no way prejudiced the Guild or the resolution of its allegations. In any event, its speculation and innuendo clearly fall short of statutory requirements.

Conditioning the outcome of a renewal proceeding on another matter before the Commission is hardly an arbitrary departure from precedent, but rather a common procedure. See, e.g., Normandy Broadcasting Corp. 7 FCC Rcd 509 (HDO, 1992) (renewal grant conditioned on final decision in another proceeding in which corporate licensee had been found lacking the requisite

character qualifications to be a Commission licensee); Western Cities Broadcasting, Inc., 5 FCC Rcd 6177 (HDO, 1990) (renewal grant conditioned on final decision in another proceeding in which principal had been found to be an undisclosed real-party in interest). In this proceeding, the Mass Media Bureau clearly did not see a need to further delay this comparative hearing, more than two years after GAF filed its renewal application, because
of the backlog at the FCC Bureau

requires a petitioner to first make specific allegations of fact sufficient to show that grant of the application would be prima facie inconsistent with the public interest, convenience and necessity; and then demonstrate that substantial and material questions of fact are in dispute. 47 U.S.C. Section 309(d).³ The Guild conveniently ignores these statutory requirements throughout its Petition. Indeed, all of the Guild's other allegations were properly denied for failing to meet that standard. As shown in GAF's Consolidated Opposition To Petition To Deny, the Guild's EEO allegations also fall short.

With regard to "factual" support of its allegations, the



classified as a Top Four employee in the two years at issue.

The Guild speculates that GAF knowingly made false reports and claims regarding its EEO practices, and withheld from correcting them until the eve of the HDO's adoption. Petition at 5. The Guild provides no evidence that GAF intended to deceive the Commission, and its speculation is totally undermined by the fact that GAF voluntarily reclassified the affected employee. Nor can the Guild explain why GAF might submit incorrect information, then correct it. While the Guild repeatedly stresses that GAF's amendment was filed just one week before the HDO's adoption date, that observation is irrelevant, because the HDO does not purport to analyze GAF's EEO record or resolve the pending EEO allegations. Even if it did, the adoption date of the HDO was not a matter within the control of GAF when it filed its amendment. The EEO Branch will obviously consider GAF's amended showing, so that GAF will be evaluated on the basis of classifying this employee in one of the bottom-nine categories. Even if originally erroneous, the misclassification of one employee does not constitute the filing of "false claims" or "false reports."

The Guild also asserts that a hearing is necessary to "assess fully" whether "any misconduct or lack of compliance" related to GAF's EEO program "is symptomatic of a broader pattern of impropriety" reflecting on GAF's character qualifications. Petition at 3. But no misconduct has been found with regard to WNCN's EEO program, let alone other vague "improprieties," and

none has been shown by the Guild.

Typical of the Guild's now-familiar pattern of reckless speculation, in utter disregard of the statutory requirements of Section 309, is the assertion that the "replacement" of WNCN's General Manager may somehow be related to the nebulous unspecified misconduct in which GAF is supposed to have engaged. Put simply, the departure WNCN's General Manager, long after the end of the relevant license term, is obviously irrelevant to the consideration of GAF's EEO record during that term. Clearly, the Guild intends to simply continue fishing for new issues and making irresponsible allegations at every juncture, as its past speculation is rejected, a litigation strategy which should not be countenanced by the Commission.

**THE COMMISSION PROPERLY CONSIDERED
AND REJECTED THE GUILD'S OTHER CLAIMS**

The Guild also claims that the HDO gave short shrift to its allegations concerning GAF's use of the name "WNCN Listeners' Club." According to the Guild, the Mass Media Bureau was somehow confused by GAF's Consolidated Opposition, and thus erroneously believed the Guild's argument was that this name was confusingly similar to its own. The Guild complains that the Bureau ignored its real argument, that GAF somehow abused the FCC's processes. Petition at 5-6.

The Guild's attack on the Mass Media Bureau's reasoning is clearly disingenuous. Its Petition To Deny quite clearly did seek an adjudication concerning alleged confusion from GAF's use

of that name:

In fact, the name of the "Club" has never been changed, and the Licensee continues to promote it heavily over its facilities. The Guild believes that the cumulative effect of a full year of such on-air and other promotion -- which may be equivalent to an advertising purchase in the hundreds of thousands of dollars -- has in fact caused significant harm to the Guild, the net effect of which could have been intended by GAF to be a weakening of the Guild's capability of sustaining its attack upon the transfer of control of the Licensee to Mr. Heyman.

Guild Petition to Deny at 7-8. The HDO properly rejected the Guild's complaint as appropriate for another forum, if indeed it is appropriate for any forum.

The Guild's other assertions, concerning unspecified alleged abuses by GAF, were cryptic and unsupported and remain so. Indeed, the Guild largely raised these vague allegations in a footnote to its argument, as it does again in its Petition. Obviously, the HDO could not resolve allegations of "threats and inducements" that the Guild has never supported with any fact. As noted above, specific allegations of fact are a basic threshold requirement before a hearing may be designated. 47 U.S.C. Section 309(d)(1). In short, the Commission could not have been expected to make the Guild's arguments for it.⁴

⁴In any event, as is evident from the Guild's Petition To Deny, the discussions between GAF and the Guild ultimately failed, and hence any suggestion that GAF attempted to "induce" the Guild to waive its ex parte rights is clearly moot. Guild Petition at 7.

**ISSUES NOT RAISED IN THE GUILD'S
PETITION FOR RECONSIDERATION CANNOT BE CONSIDERED**

CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 29th day of April, 1993 placed a copy of the foregoing "Opposition To Petition For Reconsideration" in U.S. First Class Mail, addressed to the following:

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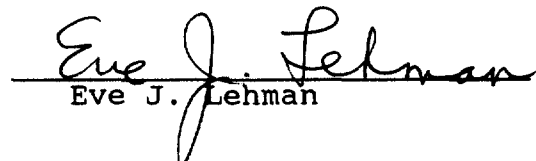
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